No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-897

SIDNEY J. HESS, JR., WILLIAM J. FRIEDMAN AND AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as successor co-trustees of the Residue Trust for John Jacob Ets Hokin,

SIDNEY J. HESS, JR. and **AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO,** as successor co-trustees of the Residue Trust for Lynda Sue Ets Hokin,

JOHN JACOB ETS HOKIN and **LYNDA SUE ETS HOKIN McCRACKEN,**

Petitioners,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CHARLES AARON,
SIDNEY J. HESS, JR.,
Suite 3350
One First National Plaza,
Chicago, Illinois 60603,
Attorneys for Petitioners.

SORG/CHICAGO U.S.A.

INDEX

CITATIONS

Cases

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO.

SIDNEY J. HESS, JR., WILLIAM J. FRIEDMAN AND AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as successor co-trustees of the Residue Trust for John Jacob Ets Hokin,

SIDNEY J. HESS, JR. and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as successor co-trustees of the Residue Trust for Lynda Sue Ets Hokin,

JOHN JACOB ETS HOKIN and LYNDA SUE ETS HOKIN McCRACKEN,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners, by their attorneys Charles Aaron and Sidney J. Hess, Jr., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Claims entered on July 9, 1976.

OPINION BELOW

The opinion of the United States Court of Claims reported at 537 F.2d 457 (Ct. Cl. 1976), is reproduced in full text in the Appendix hereto. (pp. A1 to A16) The order of the United States Court of Claims denying Petitioners' Motion for Rehearing and Suggestion for Rehearing *En Banc* is reproduced in full text in the Appendix hereto. (p. A17)

JURISDICTION

The judgment of the United States Court of Claims was entered on July 9, 1976. A timely Motion for Rehearing and Suggestion for Rehearing *En Banc* was denied on October 1, 1976 (p. A17) and this petition for a writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1. Did the United States Court of Claims, By Ignoring the Uncontroverted Facts Contained in the Record, Construe Section 1014(a) of the Internal Revenue Code to Mean That the Value Determined in Federal Estate Tax Proceedings with Respect to an Asset Contained in a Decedent's Estate, *Conclusively* Establishes the Basis of Such Asset for Federal Income Tax Purposes?

2. Did the United States Court of Claims Engage in "Judicial Legislation" by so Construing Said Section 1014(a) and by Ignoring the Fundamental Principle That Estoppel, Quasi-Estoppel or Duty of Consistency Cannot be Established in the Absence of Proof of the Acquiescence or Reliance of the Party Seeking to Assert Such Doctrines?

3. Should the United States Court of Claims Allow a Party to Raise the Affirmative Defense of Estoppel for the First Time in a Motion for Summary Judgment?

STATUTE INVOLVED

The statute involved herein is Section 1014(a) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §1014(a). This statutory provision is reproduced in full text in the Appendix. (p. A18)

INTERNAL REVENUE SERVICE REVENUE RULING INVOLVED

The Internal Revenue Service Revenue Ruling involved herein is Rev. Rul. 54-97, reported at 1954-1 CB 113. This Revenue Ruling is reproduced in full text in the Appendix. (p. A18)

COURT OF CLAIMS RULES INVOLVED

The Rules of the United States Court of Claims involved herein are Rules 37(b), 38(b) & (h), 39(a) and 101. These Rules are reproduced in full text in the Appendix. (p. A18 to A22)

STATEMENT OF THE CASE

The Petitioners herein are (i) Sidney J. Hess, Jr., William J. Friedman and American National Bank and Trust Co. of Chicago ("American National Bank"), as successor co-trustees of the Residue Trust for John Jacob Ets Hokin, (ii) Sidney J. Hess, Jr. and American National Bank, as successor co-trustees of the Residue Trust for Lynda Sue Ets Hokin, (iii) John Jacob Ets Hokin, and (iv) Lynda Sue Ets Hokin McCracken. The United States of America is the Respondent.

The Nature of the Case

This case involves the consideration of the proper basis for reporting gain for Federal income tax purposes upon the redemption of corporate stock. The particular ques-

tion is whether the Petitioners may use as their bases the actual fair market value of such stock at the applicable estate tax valuation date and are not required to use as their bases the value thereof established for Federal estate tax purposes in the absence of facts establishing the doctrines of estoppel, quasi-estoppel or duty of consistency.

In accordance with Internal Revenue Code ("Code") Section 1014(a), Revenue Ruling 54-97, 1954-1 CB 113, and applicable case law, the value of an asset established for Federal estate tax purposes constitutes only *prima facie* evidence of the basis of such asset for Federal income tax purposes. Except where it has been established that the taxpayer is estopped, this presumption may be rebutted by other evidence as to the fair market value of the asset as of the appropriate estate tax valuation date.

Loraine Ets Hokin ("Loraine") died September 6, 1955. Barney Ets Hokin ("Barney") died June 28, 1962. The estates of both Barney and Loraine contained shares of stock of International Nikoh Corporation, formerly International Rolling Mill Products Corporation ("Nikoh").

Loraine's Last Will and Testament created a trust ("International Trust") for the benefit of her minor grandchildren, John Jacob Ets Hokin ("John") and Lynda Sue Ets Hokin McCracken ("Lynda"). The International Trust was funded with Nikoh stock which had been held by Loraine's estate.

On January 25, 1965 the Nikoh stock held by both Barney's estate and the International Trust was redeemed. The redemption price was in excess of the values established for Federal estate tax purposes in the respective estates. In 1965, the International Trust was divided into two separate trusts (the "International Trusts"), one

for the benefit of John and one for the benefit of Lynda. The estate of Barney and the International Trusts, on their respective Federal income tax returns, reported gain from the redemption of the Nikoh stock equal to the redemption price less the values of the stock established for Federal estate tax purposes in the respective estates.

The estate of Barney was closed on May 29, 1967, and the assets thereof were distributed to trusts (the "Residue Trusts"), the beneficiaries of which are John and Lynda, respectively. On November 12, 1968, the Residue Trust for John, the Residue Trust for Lynda, the International Trust for John and International Trust for Lynda filed timely claims for refund in the respective amounts of $290,276.82, $193,517.88, $86,886.25 and $57,970.07 with the Commissioner of Internal Revenue, based on the premise that their respective bases in the Nikoh stock were at least equal to the redemption price. The International Trusts were terminated on December 31, 1970, and the assets thereof, including the claims for refund, were distributed to the respective beneficiaries, John and Lynda.

The claims for refund were denied by the Commissioner on or about April 16, 1973. On December 9, 1973, petitioners filed an action for refund of Federal income taxes in the United States Court of Claims pursuant to 28 U.S.C. §1491.

Respondent filed its motion for summary judgment on August 18, 1975. The Court of Claims granted Respondent's motion for summary judgment on July 9, 1976. Petitioners' Motion for Rehearing and Suggestion for Rehearing *En Banc* was denied on October 1, 1976.

The Facts

The uncontroverted affidavits filed by Petitioners in opposition to Respondent's motion for summary judgment

support the facts set forth below, which, if proven at trial, would establish conclusively that Respondent did not rely on or acquiesce in any representation or act of Petitioners.

Loraine died testate on September 6, 1955. Pursuant to Article VI of her Will, assets consisting of 3,470 shares of Nikoh stock were bequeathed to the International Trust. Pursuant to the terms of Loraine's Will, Barney, Loraine's husband, was designated as trustee of the International Trust. Barney was also the sole executor of her estate and filed the Federal estate tax return.

Barney served as sole executor of Loraine's estate during the entire period of the administration of the estate, and during the entire course of an extensive audit of the estate's Federal estate tax return conducted by the Internal Revenue Service ("Service"). Such audit was conducted by revenue agent, Donald J. Allen, Sr. ("Agent Allen") of the Service's Chicago District office.

Loraine's estate was represented in the Federal estate tax proceedings by Earl C. Brown ("Brown") of the Chicago office of Arthur Anderson & Co. During the course of the audit, the issue of the valuation of the Nikoh stock was pursued in detail by Agent Allen. Agent Allen and Brown had several conferences concerning the proper value for the shares of Nikoh stock and Brown supplied Agent Allen with all requested documentation concerning Nikoh, including Nikoh's financial statements. Agent Allen stated to Brown that he would make his own determination of the value of the Nikoh stock.

Based upon the audit, Agent Allen proposed various adjustments to the Federal estate tax liability of the estate, as evidenced by Agent Allen's Revenue Agent Report. One

such adjustment was an increase of over 55%, $128.81 to $200.00 per share, with respect to the Nikoh stock.

Barney died testate on June 28, 1962. Edward M. Ray ("Ray") was appointed as sole executor under Barney's Will. On the Federal estate tax return filed by Ray on behalf of Barney's estate, the estate's 7,180 shares of Nikoh stock were reported at a per share valuation of $98.00 as at the "alternate valuation date".

The Service conducted an extensive examination of the Federal estate tax return for Barney's estate. Jordan Bell ("Agent Bell") was one of the revenue agents who conducted said examination and Donald J. Allen, Sr., the revenue agent with respect to the Federal estate tax proceedings for Loraine's estate, was the Service's supervisor with respect to the examination of Barney's estate. Arthur Freeman and Richard Freeman of the law firm of Schwartz & Freeman, Chicago, Illinois, represented Barney's estate in the Federal estate tax proceedings.

Pursuant to these proceedings, the Service assessed a deficiency against Barney's estate. Although the Nikoh stock valuation was not modified, the Service conducted an independent examination of the value of the Nikoh stock contained in the estate.

Arthur Freeman and Richard Freeman had several conversations and conferences with Agent Bell during the course of his investigation concerning the value of the Nikoh stock. Agent Bell was supplied with all information which he requested with regard to Nikoh, including the financial statements of Nikoh for calendar years 1958 through 1962.

Arthur Freeman also discussed with Agent Bell various lawsuits ("Edwin Hokin litigation") filed during 1963 in the Circuit Court of Cook County, Illinois, Chancery Divi-

sion against Barney's estate by Edwin Hokin ("Edwin"), Barney's son. The suits sought (i) to set aside Barney's Will, (ii) damages for breach of an alleged oral contract in connection with the sale of Nikoh stock owned by Edwin, and (iii) an accounting of the various trusts established by Loraine's Will. Arthur Freeman disclosed to Agent Bell the proposed settlement of said lawsuits and the fact that pursuant to the terms of an October 2, 1964 agreement, the Nikoh stock owned by Barney's estate was being redeemed by Nikoh for a price in excess of the price listed on the Federal estate tax return. Agent Bell stated to Arthur Freeman that he would examine the court files with respect to these lawsuits. Arthur Freeman also suggested to Agent Bell that he examine the real estate owned by Nikoh.

In his report of the examination of the Federal estate tax return for Barney's estate, Agent Bell computed the transferee credit for Federal estate taxes paid upon the prior inclusion of property in Loraine's estate, which computation necessarily required that Agent Bell examine the Federal estate tax return for Loraine's estate and the Federal estate tax deficiencies proposed by the Service with respect thereto, including the adjustment of the value of the Nikoh stock.

Ray died in an automobile accident on March 14, 1965; thereafter, on April 9, 1965, Sidney J. Hess, Jr. ("Hess") and William J. Friedman ("Friedman") were appointed by the Probate Division of the Circuit Court of Cook County, Illinois, as Administrators De Bonis Non with Will Annexed of Barney's estate.

Pursuant to Decrees entered February 5 and March 23, 1965 in the Edwin Hokin Litigation (i) Hess, Friedman and American National Bank were appointed as successor co-trustees of the Residue Trust for John and as successor

co-trustees of the International Trust for John, and (ii) Hess and American National Bank were appointed as successor co-trustees of the Residue Trust for Lynda and as successor co-trustees of the International Trust for Lynda.

Hess and Friedman are attorneys practicing law in Chicago, Illinois. Neither Hess nor Friedman participated in the Federal estate tax proceedings relating to Barney's estate nor were they consulted with respect to the negotiations between the representatives of the estate and the Service or any action to be taken with respect thereto, other than the execution of a Waiver of Restrictions on Assessment and Collection (Form 890B) accepting the Federal estate tax deficiency proposed by the Service. Hess and Friedman had no connection whatsoever with Loraine's estate and the administration of Loraine's estate and the Federal estate tax proceedings relating thereto were concluded long before appointment of Hess and Friedman as successor co-trustees of the International Trusts.

John was born December 15, 1939, and Lynda was born June 4, 1943. John and Lynda were not executors of the Loraine or Barney estates nor were they ever involved in the administration of either estate. They had absolutely no contact whatsoever with the audits conducted by the Service of the Federal estate tax returns of the Loraine or Barney estates.

John and Lynda were not trustees of either the Residue or International Trusts. They have never been involved with the administration of said trusts. Prior to 1968 the only connection of John and Lynda with said trusts involved requests of John and Lynda for disbursements to them of trust funds.

On August 18, 1975, Respondent filed its Motion for Summary Judgment predicated on the defense of estoppel. This defense had never been pleaded by Respondent in its answer or any supplemental document. Respondent conducted extensive discovery procedures during 1974 relating to the value of the Nikoh stock. These procedures required Petitioners to expend a large amount of time and incur great expense in responding to Respondent's extensive interrogatories. During the course of Respondent's discovery, its attorney had several conversations with Petitioners' attorneys concerning the valuation of the Nikoh stock. At no time were the doctrines of estoppel, quasi-estoppel or duty of consistency discussed. Respondent's attorney deposed Hess, John and Lynda on December 18, 1974, and while some of the questions might be said to have some relevance to the issue of estoppel, Respondent's attorney at no time discussed such issue nor did he notify Petitioners' attorneys that such issue would be raised. Respondent did not inform Petitioners that it planned to assert a defense of estoppel until March 20, 1975, fifteen months after Petitioners filed their Petition in the Court of Claims.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Claims by Ignoring the Uncontroverted Facts Contained in the Record Construed Section 1014(a) of the Internal Revenue Code to Mean that the Value Determined in Federal Estate Tax Proceedings with Respect to an Asset Contained in a Decedent's Estate, *Conclusively* Establishes the Basis of Such Asset for Federal Income Tax Purposes.

2. The United States Court of Claims Engaged in "Judicial Legislation" by so Construing said Section 1014(a) and by Ignoring the Fundamental Principle that Estoppel, Quasi-Estoppel or Duty of Consistency Cannot be Established in the Absence of Proof of the Acquiescence or Reliance of the Party Seeking to Assert such Doctrines.

Pursuant to Rule 101(d) of the Court of Claims, which is substantially identical to Rule 56 of the Federal Rules of Civil Procedure, a motion for summary judgment shall be granted only if (i) the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to *any* material fact and (ii) that the moving party is entitled to a judgment as a matter of law. (p. A21) The majority of the Court of Claims ("Majority") totally disregarded Rule 101(d). The Majority granted Respondent's motion for summary judgment in a situation where the moving party was clearly not entitled to a judgment as a matter of law in addition to ignoring genuine issues of material fact.

As a general rule, prior to the effective date of the changes enacted by the Tax Reform Act of 1976, the basis of property in the hands of a person acquiring the property

from a decedent is the fair market value of the property at the date of the decedent's death or at the alternate valuation date. Code Section 1014(a). (p. A18)

The Federal estate tax valuation constitutes only *prima facie* evidence of the basis of property acquired by bequest, devise or inheritance for purposes of computing gain or loss pursuant to a subsequent sale. *Ford* v. *U.S.*, 276 F.2d 17, 21 (Ct. Cl. 1960); *Sam F. McIntosh,* 26 T.C.M. 1164 (1967). And, except where it has been established that the taxpayer is estopped, this presumption may be rebutted by other evidence as to the fair market value of such property at the date of death or at the alternate valuation date. Rev. Rul. 54-97, 1954-1 CB 113; *R. B. Cook,* 3 B.T.A. 668 (1925); *S. H. McConnell,* B.T.A. 32 (1933) (acq); *M. Rogers,* 31 B.T.A. 994 (1935) aff'd, 107 F.2d 394 (2nd Cir. 1939); *Northport Shores,* 31 B.T.A. (1935); *Est. of Virginia E. Devereux,* 7 T.C.M. 748 (1948); *H. S. Delone,* 6 TC 1188, (1946); *Johnson* v. *Commissioner,* 270 F.2d 134 (4th Cir. 1959), 284 F.2d 357 (4th Cir. 1960), on remand 20 T.C.M. 1032 (1961), aff'd 302 F.2d 86 (4th Cir. 1962); *Ford, supra; Sam F. McIntosh, supra; Roberts Trust,* 29 T.C.M. 252 (1970).

These concepts were set forth by the Majority in its opinion, where the Majority also carefully described the elements "necessary to establish that a duty of consistency exists, such that a party is estopped, or quasi-estopped, from changing its position". (p. A12):

1. The Taxpayer must have made a representation or reported an item for tax purposes in one year.
2. The Commissioner must have *acquiesced* or *relied* on that fact for that year.

3. The Taxpayer must have changed the representation, previously made, in a later year after the statute of limitations on assessments bars adjustment for the initial years.

Judge Kunzig dissented from the opinion of the Majority. He recognized that the Majority had totally disregarded the numerous facts contained in the record clearly demonstrating the complete absence of the element of acquiescence or reliance. Judge Kunzig stated:

> "This Court has been treated to a lengthy oral argument of facts by plaintiffs, followed by an even more vehement discussion of confusing, conflicting and even opposite facts by defendant. Clearly, the present posture of this case calls for a trial to resolve relevant facts in two crucial areas, once and for all." (p. A14)
>
> • • • •
>
> "Although the majority states that it has given such careful consideration to the circumstances of this case, the detailed *factual disputes* which highlighted oral argument have apparently been resolved in favor of the Government." (p. A16) (Emphasis added)

The Majority took great pains to demonstrate that it requires the element of acquiescence or reliance to be present, but such demonstration was a mere facade. The effect of the Majority's holding is that regardless of whether the facts show that the Service did not rely on or acquiesce in the taxpayer's representations, the Court of Claims will estop that taxpayer and any other taxpayer from challenging those representations after the statute of limitations has run. The doctrines of estoppel, quasi-estoppel, and duty of consistency and the element of acquiescence or reliance were totally ignored. The Majority has in effect established a new principle of law that the Federal estate tax value of an asset *conclusively* establishes the basis of such asset for Federal income tax purposes, even if the doctrines of estoppel, quasi-estoppel, or duty of consistency have not been established. This prin-

ciple is totally contrary to established precedent as evidenced, for instance, by the Service's own Revenue Ruling:

> "Except where the taxpayer is estopped by his previous actions or statements, such [estate tax] value is not conclusive but is a presumptive value which may be rebutted by clear and convincing evidence." Rev. Rul. 54-97, *supra*. (p. A18)

The facts set forth in the record clearly demonstrating the absence of "acquiescence or reliance" are as follows:

1. With respect to the Nikoh stock owned by Loraine's estate:

(a) The Service conducted an extensive audit of the Federal estate tax return and by reason of said audit increased the value of the Nikoh stock by over 55%, from $128.81 to $200.00 per share.

(b) Agent Allen, who audited the Federal estate tax return, had full access to the records of Nikoh and was supplied with all information which he requested, including Nikoh financial statements. Several discussions concerning the value of the Nikoh stock took place between Agent Allen and Mr. Brown who represented Loraine's estate. Agent Allen stated that he would make his own determination of the value of the Nikoh stock.

2. With respect to the Nikoh stock owned by Barney's estate:

(a) The Service conducted an extensive audit of the Federal estate tax return.

(b) The Service had access to all the financial records and documents pertaining to Nikoh and was furnished by the representatives of Barney's estate with all information requested by the Service with respect to Nikoh, including the financial statements of Nikoh for the years of 1958 through 1962.

(c) Discussions were held between Agent Bell, who audited the Federal estate tax return, and representatives of Barney's estate concerning the valuation of the Nikoh stock. The Service was made aware of the settlement of certain litigation potentially affecting such stock and the fact that the Nikoh stock owned by Barney's estate was to be redeemed by Nikoh, pursuant to a settlement agreement, for a price in excess of the value at which said stock was reported on the Federal estate tax return. The Service was advised that the settlement agreement would be submitted to the court for approval. The representatives of Barney's estate also suggested to Agent Bell that he examine the real estate owned by Nikoh.

Judge Kunzig recognized that these facts, if proven at trial, might establish that the Service could not have acquiesced or relied upon the values of the Nikoh stock reported in the respective estate tax returns by representatives of the Loraine and Barney estates. Although the Majority stated that they did not rely on any facts except undisputed ones, it is inconceivable that they could have held that the element of "acquiescence or reliance" was present and still have considered the facts described above. It is earnestly submitted by Petitioners that there were no such undisputed facts upon which the Majority could have relied.

The Majority's failure to properly focus on the concepts of estoppel, quasi-estoppel or duty of consistency is demonstrated by the statement that "plaintiffs seem to argue that since defendant conducted an audit, plaintiffs' representations as to value were ignored." (P. A12) This was not Petitioners' argument. To the contrary, Petitioners argued that the Service did not, as a matter of fact or law, acquiesce in or rely upon any representations which were made by the representatives of the Barney and Loraine estates with respect to the value of the Nikoh stock. The Majority's statement that the Service "relied

on the estate's initial valuation and later acceptance of any change due to the audit'' is a conclusion not supported by any undisputed facts before the Court and one that cannot be reached on summary judgment, if at all. (P. A12)

The law is well settled that a presumption exists that in the absence of evidence to the contrary, public officials are presumed to properly execute the duties and responsibilities of their office, as required by the statutes, regulations or internal agency rules. *U.S.* v. *Chemical Foundation, Inc.*, 272 U.S. 1; *Atlantic Refining* v. *U.S.*, 44 F.2d 101 (Ct. Cl. 1930). In the absence of proof to the contrary, it must be assumed that Agents Allen and Bell, as they were required to do, completely analyzed all information provided to them by the representatives of the estates of Barney and Loraine, and reached their own conclusions with respect to the values of the Nikoh stock.

The Majority stated that Hess and Friedman, who were appointed co-administrators of the Barney estate in 1965, did not correct the $98 per share value on the Federal estate tax return after the stock was redeemed at a price of $367, nor did they seek to raise this figure when they filed the Federal income tax return for Barney's estate. As described in detail on pages 7 through 9 of this petition, at the time of the Federal estate tax audit representatives of Barney's estate supplied the revenue agent with all data requested and required to determine the value of the Nikoh stock. At the time Hess and Friedman filed the estate's Federal income tax return for the fiscal year ended May 31, 1965 and the claim for refund of Federal estate taxes (which dealt only with other issues), they had every reason to assume that the Service did consider and give effect to all the data made available to it with respect to the Nikoh stock when it valued such stock in the estate tax proceedings.

With respect to the Nikoh stock contained in Loraine's estate, the Majority totally misapplied the concept of

''acquiescence or reliance'' as well as the particular facts involving the estate. The Majority stated:

> ''The $200.00 figure was the Government agent's figure but the estate representatives *acquiesced in it* and cannot but have had some input in establishing it, if only by claiming a still lower figure initially.'' (p. A12) (emphasis added)

The crucial issue is ''acquiescence or reliance'' on the part of the Service, not on the part of the estate's representatives. The fact that the estate's representatives may have had some input in establishing the value of the Nikoh stock is totally irrelevant as to whether the Service acquiesced in or relied upon any representations they may have made. The facts of this case clearly establish the contrary. Furthermore, the Majority's statement that the estate's representatives ''cannot but have had some input'' in establishing the valuation is merely an assumption. Assumptions based on disputed facts are not proper in the context of a motion for summary judgment.

In addition, the Majority stated:

> ''The interest of the two entities being very closely related *and the same individual having acted,* we think it only fair and in accord with the spirit of law, to require the trust to act in a manner consistent with the estate''. (p. A14) (emphasis added)

The emphasized portion of the quote is factually incorrect. The executor of Loraine's estate was Barney, who died in 1962. Although Barney was the initial trustee of the International Trust, he died prior to the negotiations concerning the redemption of the Nikoh stock. Ray, the successor trustee of the International Trust, had nothing to do with the administration of Loraine's estate. In addition, as recognized by the Majority, Loraine's estate and the International Trust are distinct and separate entities. The Majority was clearly wrong in stating that the same indi-

vidual acted with respect to the administration of Loraine's estate and the International Trust.

Taking into consideration the numerous uncontroverted facts presented by Petitioners which, at the very least, established genuine issues of fact as to whether the Service "acquiesced or relied" on representations made by representatives of the two estates, the actual holding of the Majority can only be one of the following:

1. Acquiescence or reliance is not an element necessary to establish the doctrines of estoppel, quasi-estoppel, or duty of consistency.
2. The mere filing of a Federal estate tax return is sufficient in and by itself to estop any taxpayer, whether it be the same taxpayer that files the return or an unrelated taxpayer (i.e., International Trust) from proving the actual value of an asset for Federal income tax purposes.

No court has ever taken such a position. The Majority's opinion is totally contrary to the established principle, to which the Majority gives lip service, that all elements of the relevant estoppel, quasi-estoppel, or duty of consistency doctrines must be proved. By cloaking its conclusion in the words of these doctrines the Majority engaged in a charade. Its action can be construed only as "judicial legislation." To permit the decision of the Court of Claims to stand would be a recognition that the establishment of the value of an asset in Federal estate proceedings *conclusively* establishes the basis of such asset for future Federal income tax purposes without the necessity of establishing sufficient facts to prove the existence of estoppel, quasi-estoppel or duty of consistency, and would, in effect, abolish these doctrines in situations involving the Federal income tax basis of an asset received from an estate.

Based upon the above, respondent was clearly not entitled to a judgment as a matter of law. Based upon Rule

101(d), under such circumstances the granting of a motion for summary judgment was improper.

This Court has frequently and emphatically decreed that summary judgment, "should be cautiously invoked to the end that parties may always be afforded a trial where there is a *bona fide* dispute of facts between them". *Associated Press* v. *U.S.*, 326 U.S. 1, at 6. Judge Kunzig recognized that the Majority ignored the mandate of this Court regarding summary judgment:

> "This Court has been treated to a lengthy oral argument of facts by plaintiffs, followed by an even more vehement discussion of confusing, conflicting and even opposite facts by defendant. Clearly, the present posture of this case calls for a trial to resolve relevant facts in two crucial areas, once and for all." (p. A14)
>
> • • •
>
> Different taxpayers are being held to the 'duty of consistency' without key findings as to the closeness of their relationship or without other crucial determinations (important in *Ford*) as to actions taken by the IRS at the time of the estate tax filings." (p. A16)

It is well established that on a motion for summary judgment all doubts as to the existence of a genuine issue as to a material fact should be resolved against the moving party. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144. The Majority obviously ignored this principle.

As discussed in detail on pages 6 through 9 of this petition, the comprehensive audits conducted by the Service, during which extensive financial information was supplied to the revenue agents, in addition to the discussions between the revenue agents and representatives of the respective estates concerning the value of the Nikoh shares, including, with respect to the estate tax audit of Barney's estate, a discussion of the redemption of the Nikoh shares, can only support Judge Kunzig's conclusion that there exist genuine issues of material fact requiring

resolution at trial. In addition, none of these essential facts has ever been controverted by the Respondent by affidavit or otherwise.

The Majority, by granting summary judgment when genuine issues of material facts exist, has denied Petitioners the right to have their case heard by a trier of fact. This right is guaranteed by the Fifth Amendment to the United States Constitution. That this right to a trial of factual issues permeates the summary judgment procedure is supported by decisions of this Court. *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464; *Sautor* v. *Arkansas Gas Corp.,* 321 U.S. 620.

The Majority has improperly applied Section 1014(a) and the doctrines of estoppel, quasi-estoppel and duty of consistency. In addition, the Majority has ignored this Court's mandate requiring the proper application of summary judgment. Furthermore, Petitioners' right to due process has also been denied. For these reasons this Court should grant certiorari to review the judgment of the Court of Claims.

3. The United States Court of Claims Should Not Allow a Party to Raise the Affirmative Defense of Estoppel for the First Time in a Motion for Summary Judgment Since The Rules of the Court of Claims Require Such a Defense to be Pleaded in the Answer or Other Responsive Pleading.

The United States Court of Claims Rules 37(b) and 38(b) require the defense of estoppel to be affirmatively pleaded. Rule 38(h) clearly states that the defense of estoppel may not be raised for the first time in a motion for summary judgment. There is good reason for this rule. A defendant is required to put the plaintiff on notice at the earliest possible time as to the defense or defenses the defendant may assert in the matter in controversy, so that the plaintiff may have adequate time to

prepare its case and expend its time and resources in a manner relevant to the issues in controversy.

Rule 39(a) allows a party to amend his pleading ". . . (i) by leave of Court (which shall be freely given when justice so requires) . . . ." The above quoted portion of Rule 39(a) is identical to a provision contained in Rule 15(a) of the Federal Rules of Civil Procedure ("Federal Rules"). Thus, decisions pertaining to Federal Rule 15(a) are relevant to an interpretation of Rule 39(a).

This Court has stated that leave to amend under Federal Rule 15(a) is to be "freely given when justice so required." *Foman* v. *Davis,* 371 U.S. 178. However, it has been held that the trial court must exercise its discretion in granting leave to amend a party's pleadings and is not required to grant such leave, as otherwise there would be no reason to seek leave of court. *Friedman* v. *Transamerica Corp.,* 5 F.R.D. 115, 116 (D. Del. 1946).

Based upon the facts set forth on page 10 of this petition, the majority should not have permitted Respondent to amend its answer some sixteen months after the original answer was filed. Respondent was grossly delinquent in its failure to raise the defense of estoppel at a much earlier date. Respondent merely alleged in its motion that its failur to plead the affirmative defense of estoppel was due to "inadvertence" without presenting any support for, or stating any facts relating to, this allegation. Where no valid reason for neglect, inadvertence or delay is shown, leave to amend will be denied. *Carrol* v. *Pittsburg Steel Co.,* 103 F.Supp. 788 (W.D.Pa. 1052).

The Majority should not have allowed Respondent to escape the principle of fair and timely notice by casually asserting that the failure to plead the defense of estoppel was due to mere inadvertence. As one court recently stated:

> "Taking the most aggressive and advantageous stance for one's position in [*sic*] the natural one for any

party, given the nature of the adversary process. But counsel for a party, especially the United States, have a higher duty to the Court and a duty to the taxpayer (whose advisary means are far from equal in most cases) to be candid and fair." *Est. of Connelly* v. *U. S.*, 398 F. Supp. 815, at 817-18 (D.N.J. 1975).

That Respondent should not have been allowed to amend its answer to present its defense of estoppel, was clearly recognized by Judge Kunzig in his dissent:

> "The majority's decision permits defendant to amend its answer some two years after the original answer was filed. The amendment allows defendant to plead the defense of estoppel, quasi-estoppel or duty of consistency. The conclusion of the majority is premised upon its opinion that amendment should be granted 'in the interest of justice' under Ct. Cl. Rule 39. Normally, I would agree with the court. Leave to amend should be freely granted where one party presents a valid claim or defense and the other party is not prejudiced by the amendment. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). However, I believe that defendant must be compelled to do justice in order to reap its benefits. In the instant case plaintiffs allege that defendant's conduct has caused them to undertake expensive discovery procedures which could have been avoided had defendant submitted a proper answer. Accordingly, I would, at least, condition defendant's leave to amend on repayment of any additional cost caused by its erroneous course of conduct." (pp. A14-15)

Judge Kunzig also was correct in refuting the Majority's *dicta* that the defense of quasi-estoppel is a legal defense and not an equitable one and therefore need not be pleaded:

> "Even more serious is the majority's dicta to the effect that defendant need not have entered a motion to amend its answer in order to rely on the 'duty of consistency' defense. The court bottoms this idea on its notion that the duty is more in the nature of a *legal defense* rather than an *equitable one*. However, the court's characterization ignores the dictates of Ct. Cl.

> Rule 37 and the philosophy of notice pleading. Rule 37(b) requires that affirmative defense or matters constituting an avoidance be specifically set forth in the pleadings. The 'duty of consistency' is clearly in the nature of an avoidance. As such it must be set forth affirmatively in defendant's answer, or waived under Ct. Cl. Rule 38(h). Otherwise defendant could 'trap' unwary plaintiffs by failure to put them on notice that they will have to resist the 'duty of consistency' avoidance." (p. A15, n.1)

The Majority erred when it granted Respondent's motion for leave to amend its answer. Such an error is of sufficient importance to the Court in the exercise of its supervisory powers over Federal courts to justify the grant of certiorari to review the judgment of the Court of Claims.

CONCLUSION

For the above and foregoing reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,

CHARLES AARON,
SIDNEY J. HESS, JR.,
Suite 3350
One First National Plaza
Chicago, Illinois 60603
Attorneys for Petitioners.

December 29, 1976.

APPENDIX

OPINION OF THE UNITED STATES COURT OF CLAIMS

DECIDED JULY 9, 1976.

APPENDIX

OPINION OF THE UNITED STATES COURT OF CLAIMS DECIDED JULY 9, 1976.

IN THE UNITED STATES COURT OF CLAIMS

• • (Caption — No. 471-73) • •

(Decided July 9, 1976)

Before NICHOLS, KUNZIG and BENNETT, *Judges.*

ON DEFENDANT'S MOTION FOR LEAVE TO AMEND ITS ANSWER AND FOR SUMMARY JUDGMENT

NICHOLS, *Judge,* delivered the opinion of the court:

This case involves the gains on the redemption of 10,650 shares of International Nikoh Corporation (formerly known as International Rolling Mills Products Corporation and hereinafter referred to as Nikoh) in 1965. The issue is whether the bases on which the gains are computed are the amounts used in the estate tax valuation of two estates through which the stock passed to the taxpayers, or the then fair market values to be newly determined without regard to such amounts. We hold the former in the circumstances of this case.

Plaintiffs are Sidney J. Hess, Jr., William J. Friedman and American National Bank and Trust Co. of Chicago (American National Bank), as successor co-trustees of the Residue Trust for John Jacob Ets Hokin (hereinafter referred to respectively as Residue Trustees for John and Residue Trust for John) and Sidney J. Hess, Jr., and American National Bank as successor co-trustees of the Residue Trust for Lynda Sue Ets Hokin McCracken, John Jacob Ets

Hokin, and Lynda Sue Ets Hokin McCracken. Plaintiffs are seeking a refund of federal income taxes paid by (1) the estate of Barney Ets Hokin for the fiscal year ending May 31, 1965 in the amount of $483,794.70; (2) the International Trust for John for the year 1965 in the amount of $86,836.25; and (3) the International Trust for Lynda for the year 1965 in the amount of $57,990.07, plus statutory interest on each amount. We have jurisdiction pursuant to 28 U.S.C. § 1491.

I.

Nikoh manufactured mechanical tubing and electrical mechanical tubing for sale to electrical contractors and manufacturers of such products as bicycles and steel furniture. Nikoh was also involved in steel warehousing.

The Nikoh stock in issue was redeemed from the estate of Barney Ets Hokin and from a certain testamentary trust created by the will of Loraine Ets Hokin.

Loraine Ets Hokin died testate on September 6, 1955. Pursuant to her will, 3470 shares of her Nikoh stock were to be held in a trust referred to as the International Trust for the benefit of her then minor grandchildren, John and Lynda Ets Hokin. The trust was to terminate on December 31, 1970 at which time 60 percent of the assets were to be distributed to John and 40 percent to Lynda. A federal estate tax return was filed on December 18, 1956, valuing the Nikoh stock at $128.81 per share. The Internal Revenue Service (IRS) conducted an audit and as a result thereof, the value of the stock was raised to $200 per share. The estate paid the deficiency and the stock became the corpus of the International Trust for John and Lynda Ets Hokin.

Barney Hokin died testate on June 28, 1962, owning 7,180 shares of Nikoh stock. On the federal income tax return filed on behalf of the estate on September 27, 1963,

the Nikoh stock was valued at $98 per share. On the federal estate tax return, the Nikoh stock was valued, as of the Alternate Valuation Date, at $98 per share.

After the death of Barney Hokin, his son, Edwin Hokin, the father of Lynda and John Hokin, filed three suits in the Circuit Court of Cook County, Illinois. One suit named Edward M. Ray, individually and as executor of Barney's estate, John and Lynda Ets Hokin and certain others as defendants and sought to have Barney's will set aside. A second suit against Ray, as executor of the Barney estate, and Nikoh, sought damages for the breach of an alleged contract in connection with Edwin Hokin's sale of Nikoh stock. The third suit named Ray individually, as executor of Barney's estate, and as trustee under Loraine's will, John Hokin and Lynda Hokin as defendants and sought an accounting of the affairs of the trusts set by the will of Loraine Hokin.

Mr. Sidney Hess was retained to represent John and Lynda Ets Hokin in connection with these suits. After extensive negotiations, the various law suits were settled as reflected in court decrees of February 5, 1965 and March 23, 1965. Ray was replaced as trustee of the family trusts. Sidney Hess and American National Bank were appointed trustees for all trusts in which Lynda was primary beneficiary. Hess, American National Bank and William Friedman were designated trustees for all trusts in which John was the primary beneficiary. Pursuant to an "Agreement for Redemption of International Nikoh Corporation Shares," dated January 25, 1965, effective February 5, 1965, the Nikoh stock held by the estate of Barney Ets Hokin and by the International Trust for John and Lynda was redeemed for $367 per share. The interests of John and Lynda were severed, so that the International Trust for John held 60 percent of the corpus previously held by the International Trust for John and Lynda and

the International Trust for Lynda held 40 percent of said corpus. Similarly, the residuary estate of Barney Ets Hokin was separated later into two portions of which 60 percent was to be held for the benefit of John and 40 percent was to be held for Lynda.

Ray died unexpectedly on March 14, 1965 and was replaced by Sidney Hess and William Friedman as administrators of the estate of Barney Ets Hokin in April 1965. At that time, the federal estate tax return had already been filed and was undergoing an audit. In June 1965, deficiencies were proposed based on adjustments to entries other than the Nikoh stock, which had been reported at $98 per share. The estate paid the deficiency and no one attempted to correct the $98 per share valuation, although this was after the redemption agreement above mentioned.

On November 15, 1965, Hess, as co-administrator of the Barney Ets Hokin estate, filed the estate's federal income tax return for the fiscal year ending on May 31, 1965. The redemption of the Nikoh stock on February 5, 1965 was reported on this return and the gain thereon computed using the $98 per share value as reported on the taxpayer's federal estate tax return as the cost basis of the stock.

The International Trust from which the remaining shares were redeemed was severed into two parts by court decree of March 23, 1965, as described above. Consequently, although the redemption took place before the severance, the gain was reported by successor trusts known as the International Trust for John and the International Trust for Lynda. The return for the International Trust for John for the year 1965, which was filed by Sidney Hess, William Friedman and the American National Bank, as trustees, used as its basis in the redeemed stock, $200 per share, the amount used to compute Loraine Ets Hokin's

federal estate tax. The same $200 per share basis was used computing the gain reported by the International Trust for Lynda on the 1965 return filed by the trustees, Hess and the American National Bank.

The Probate Court approved the First and Final Account of Administrator de bonis non with Will Annexed of the estate of Barney Ets Hokin on May 29, 1967. Among the assets distributed pursuant to this accounting were interests of 60 percent and 40 percent, respectively, to the Residue Trust for John and the Residue Trust for Lynda, in the "claims against the Internal Revenue Service for refund of Federal Estate Tax and Federal Income Taxes."

On June 26, 1967, claims were filed by the trustees of the Residue Trust for John and the Residue Trust for Lynda seeking refund of federal estate taxes paid by the estate of Barney Ets Hokin on several grounds, none of which involved the value of the Nikoh stock redeemed. These claims were partially allowed and the trustees accepted the resulting overassessment in August 1968. No action was taken to increase the value of the Nikoh stock on the estate tax return.

On November 12, 1968, claims for refund were filed by (1) Sidney Hess, William Friedman, and the American National Bank, as trustees of the International Trust for John for the year 1965; and (2) Sidney Hess and the American National Bank as trustees of the International Trust for Lynda for the year 1965. These claims were based on the allegation that the gain reported on the redemption of Nikoh stock from the International Trust, created by the will of Loraine Ets Hokin, was erroneous because the basis of the stock was at least equal to the redemption price of $367 per share rather than the $200 per share used in computing the federal estate tax. By this time, the statute of limitations had run with respect to the estate tax assessment.

On the same day, claims were filed by (1) Sidney Hess, William Friedman and the American National Bank as trustees of the Residue Trust for John and (2) Sidney Hess and the American National Bank as trustees of the Residue Trust for Lynda. These claims were based on the allegation that the gain reported on the redemption of Nikoh stock from the estate of Barney Ets Hokin was erroneous because the basis of the stock was at least equal to the redemption price of $367 per share rather than $98 per share as reported on the taxpayer's federal estate tax return.

On December 31, 1970, the International Trust for John and the International Trust for Lynda terminated in accordance with the terms of Loraine Ets Hokin's will and the assets of these trusts were thereafter distributed to John and Lynda Ets Hokin respectively. The claims for refund filed by the trustees were among the assets distributed.

On April 16, 1973, waivers of statutory notice of claim disallowances were filed. Thereafter on December 19, 1973, plaintiff filed suit in this court.

II

The case is before the court now on defendant's motion for leave to amend its answer to include the defense of estoppel, filed September 20, 1975, and on defendant's motion for summary judgment, filed August 18, 1975. We consider first defendant's motion for leave to amend its answer.

Defendant, in its motion for summary judgment, argued that plaintiffs should be estopped from arguing that the basis of the Nikoh stock in issue differed from the values used for federal estate tax purposes. However, defendant's original answer, filed March 28, 1974, did not contain the defense of estoppel, which under this court's Rule 37(b)

must be affirmatively pleaded. Defendant contends that plaintiff's counsel have been on notice that defendant intended to assert the issue of estoppel since June 1974 and that therefore, plaintiffs will not be prejudiced by an amendment of the pleading at this time. Plaintiff opposes the motion alleging that defendant was "grossly delinquent" in its failure to raise the defense at an earlier date.

This court's Rule 38(h) provides that if a party does not affirmatively plead estoppel in its answer, the defense is waived. However, Rule 39(a) allows the pleadings to be amended by leave of court "which shall be freely given when justice so requires." Rule 39(b) allows for amendment of the pleadings to conform to the evidence at any time, even after trial.

Rule 39(a) and 39(b) should be liberally construed. The Supreme Court has stated that "* * * [i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules required, be 'freely given.' * * *" *Foman* v. *Davis,* 371 U.S. 178, 182 (1962) (discussing Fed.R.Civ.P. 15(a) which is identical to our Rule 39(a)).

Plaintiffs contend that there has been undue delay and that they will be prejudiced by defendant's amendment at this point. Neither argument withstands close scrutiny. Mere delay is insufficient to bar amendment of the pleadings and plaintiff has not demonstrated that it has been or will be prejudiced, other than the fact that it incurred costs in discovery proceedings with respect to the value of the stock. Plaintiff has not been precluded from presenting its case.

Plaintiffs knew at some time prior to oral argument that estoppel was an issue and were able to brief and argue the point. Justice requires that defendants be granted leave to amend, pursuant to Rule 39(a). Moreover, we could also grant defendant's motion based on Rule 39(b). As the court said in *Erickson* v. *United States,* 159 Ct. Cl. 202, 210, 309 F. 2d 760, 764 (1962), "* * * here the course of proceedings was such that it is just and proper to consider the pleadings amended (under our Rule [39(b)], 'Amendments To Conform to the Evidence') to state the defense of estoppel * * *." In *Erickson,* plaintiff's counsel was aware of the defense of estoppel at trial. He did not introduce evidence to counteract this defense which he would have done had estoppel been pleaded, but he did inform the court what the evidence would have been, and for purposes of the opinion, it was taken as if proven. Thus although the defendant in *Erickson* did not affirmatively plead estoppel in its answer, the court, after trial, nevertheless considered the affirmative defense of equitable estoppel. Similarly, the evidence before the court here strongly indicates an estoppel and therefore mandates that defendant be allowed to amend its answer to conform to the evidence in accordance with Rule 39(b) to permit justice to be done. Plaintiffs admit that the value used to determine estate tax liability is different from the value they seek to use to compute the gain on the redemption of the stock. There is no dispute as to the facts relied on to raise the issue of estoppel and of course we could not find any disputed facts at this time.

Accordingly, defendant's motion for leave to amend its answer is granted. Although we have allowed the motion on the strength of Rules 39 (a) and (b), we could have granted the motion without consideration of these rules. The defense to plaintiffs' petition is based in large part on

the Internal Revenue Code and Treasury Regulations. As such it is not merely an equitable defense, such as the word "estoppel" normally denotes as stated in *Erickson, supra,* but more in the nature of a legal defense. As indicated below, it is sometimes called "quasi-estoppel." Failure to raise such an issue in the answer does not constitute waiver of the defense.

III

We now turn to defendant's motion for summary judgment. The issue in this case is whether the estate must use the value of stock as reported on its federal estate tax as its basis in computing gain on the subsequent redemption of the stock, and, similarly, whether a testamentary trust must use the value of stock as finally determined for the purpose of the federal estate tax as its basis in computing gain on the subsequent redemption of the stock. Defendant bases its argument on theories of estoppel, quasi-estoppel, and the "duty of consistency," and posits that the estate of Barney Ets Hokin and the International Trusts created by the will of Loraine Ets Hokin should be estopped from using as the basis of the stock any value other than that used by the respective estates in computing their federal estate tax. Plaintiffs, however, urge that they should be allowed to prove that the stock in question was erroneously undervalued for estate tax purposes. Plaintiffs contend that the Nikoh stock was worth at least $367 per share as of the two dates used for valuation of the stock by the estates.

As a general rule, the basis of property in the hands of a person acquiring the property from a decedent is the fair market value of the property at the date of the decedent's death or at the alternate valuation date if used. 26 U.S.C. § 1014(a). This basis, as adjusted, is used if the property

is later sold, exchanged, or, as in the present case, redeemed, in order to determine gain or loss. 26 U.S.C. §§ 1001, 1011. The fair market value of the property at the time of the decedent's death or at the alternate valuation date is also the amount required to be reported on the taxpayer's federal estate tax return. 26 U.S.C. §§ 2031, 2032. The identity of the two values in the congressional mind is clearly indicated by the fact that the election by the decedent's estate to use the alternate valuation date binds the subsequent income tax payer. This would be often meaningless if the value figure chosen did not bind him also.

The success of an estate in getting through IRS audit a low valuation of property may turn into a Pyrrhic victory in the event of subsequent income taxation. This is a matter practitioners in the field are well aware of and it tends to minimize disputes as to the valuation of estates, where assets other than listed securities are involved, and especially with real property. It furthers the concept of self-assessment. However, a rule that the estate tax valuation must always be the basis for the subsequent income tax, might be fair, and within the congressional contemplation, but it is too simple to stand against the trends that ever operate to maximize complexity in our tax structures. Should there ever be a plain and simple rule, something is sure to happen to it. So here. We do not wish, however, to use our powers to enlarge the exceptions already extant, and further complicate the rule.

It is too late in the day to rely exclusively on a literal reading of the statute. Treasury Regulation 1.1014-3 provides that the value of property as of the date of decedent's death as appraised for the purpose of the federal estate tax or the alternate value as appraised for such purpose "shall be deemed to be its fair market value," and so provided at the date of the transactions here involved. While not

statutory, Treasury Regulations do have the force and effect of law. The Internal Revenue Service explained further in Rev. Rul. 54—97, 1954—1 CUM. BULL. 113 that "* * * [e]xcept where the taxpayer is estopped by his previous actions or statements, such value is not conclusive but is a presumptive value which may be rebutted by clear and convincing evidence." And finally, this court, in *Ford* v. *United States,* 149 Ct. Cl. 558, 276 F. 2d 17 (1960), stated that a then applicable Treasury Regulation, which corresponds to Treas. Reg. 1.1014—1, was intended to make the appraised value prima facie evidence of actual value. We noted in *Ford* that the regulation and the doctrines of estoppel should be "* * * proceeded with cautiously, and with a careful regard to the circumstances of the case." At 566, 276 F. 2d at 21. The court did not say that estoppel could never be applied, but only that the facts of the *Ford* case did not warrant such an application.

After giving "careful regard to the circumstances of the case," we hold for defendant. Courts have long recognized that a taxpayer has an equitable responsibility to report transactions which have an impact upon different taxable periods or different taxes in a consistent manner. *R. H. Stearns Co.* v. *United States,* 291 U.S. 54 (1934). The Congress recognized this duty with respect to income taxes when it enacted section 3801 of the 1939 Internal Revenue Code, now 26 U.S.C. §§ 1311—15, relating to the correction of errors when a taxpayer or the Commissioner has taken an inconsistent position in a later year after the statute of limitations had expired. This provision does not apply here, but this so-called "duty of consistency" is also an equitable consideration strongly intimated by the Code's requirement that fair market value be used to determine the basis of property in the taxation of the estate and also in the income taxation of the recipient of the property.

Three elements are necessary to establish that a duty of consistency exists, such that a party is estopped, or quasi-estopped, from changing its position. First, the taxpayer must have made a representation or reported an item for tax purposes in one year; second, the Commissioner must have acquiesced or relied on that fact for that year; and third, the taxpayer must desire to change the representation, previously made, in a later year after the statute of limitations on assessment bars adjustment for the initial years. *Beltzer* v. *United States,* 495 F. 2d 211, 213 (8th Cir. 1974). The term "quasi-estoppel" is used approvingly in that case, which involves a situation much like the one here. See also other cases cited therein.

Plaintiff contends that the duty of consistency is not applicable because defendant did not rely on the valuation of the stock as set forth in the Barney and Loraine Ets Hokin estate tax returns. Plaintiff seems to argue that since defendant conducted an audit, plaintiffs' representations as to value were ignored. In the Barney estate, the Government accepted the value of the stock in question as reported in the estate tax return as a partial tax base. It relied on the estate's initial valuation and later acceptance of any change due to the audit. Plaintiffs did not seek to raise the value of the stock until after the statute of limitations had run on the estate tax assessment, thereby causing the defendant to rely, perhaps to its detriment, on the agreed valuations. With respect to the Barney estate, Mr. Hess and Mr. Friedman, who were appointed co-administrators in 1965, moreover did not correct the $98 per share value on the estate tax return after the redemption agreement at $367, nor did they seek to raise that figure when they filed a federal income tax return for the estate. In the Loraine estate tax return, the $200 figure was the Government agent's figure but the estate representatives acquiesced in it and cannot but have had some input in establishing it, if only by claiming a still lower figure initially.

Plaintiffs rely heavily on *Ford* v. *United States, supra,* to support their position that it should not be estopped from proving the actual value of the stock in issue. This court did not find the necessary basis for estoppel in *Ford* after examining the facts of that case. The facts of the instant case are distinguishable and the result need not be, and is not, the same as in *Ford.*

In *Ford,* the plaintiffs sold stock which they had received from their father's estate and reported the gain on their own personal income tax returns. In computing gain, they used as their basis in the stock a larger figure than that used by their father's estate for federal estate tax purposes. The court held that plaintiffs were not estopped from proving actual value as of the date of their father's death because they had not taken part in the representation made in the federal estate tax return. Thus *Ford* does not aid us in determining whether the Barney estate is estopped from proving a higher value for purposes of determining gain on the redemption of the stock. Here, there is a direct change of position by a single taxpayer, the estate of Barney Ets Hokin. Moreover, the individuals who are trustees of the Residual Trust created under the will of Barney Ets Hokin were also co-administrators of the estate. They filed claims for refund of federal estate tax on grounds other than the value of the Nikoh stock and accepted the valuation of the stock at $98 per share.

Plaintiffs assert that John and Lynda Ets Hokin are the real parties in this matter as they are the ultimate beneficiaries of the Barney estate. Presumably, plaintiffs think that this argument brings the case within the scope of *Ford.*

However, we do not agree, since neither is the taxpayer here, nor filed the returns in issue, and therefore their interests are only derivative.

The remaining question is whether the International Trust must use the same basis in computing its gain as the estate which created it. The estate and the trust are separate legal entities; however, the mandate of 26 U.S.C. §§ 1014 and 2031, read together, does apply. The interests of the two entities being very closely related, and the same individual having acted, we think it only fair and in accord with the spirit of law, to require the trust to act in a manner consistent with the estate. *Beltzer, supra,* involved taxpayers who were not the estate which made the original representation. That court distinguishes *Ford* as involving persons who were minors when the estate tax return was filed and had nothing to do with it.

Plaintiffs strenuously maintain that summary judgment is inappropriate because there are facts in dispute, necessitating trial. We have not relied on any facts except undisputed ones, and the facts plaintiffs would like to prove would not change the result.

Accordingly, defendant's motion for leave to amend its answer is granted. Defendant's motion for summary judgment is granted. The petition is dismissed.

KUNZIG, *Judge,* dissenting:

In good conscience, I must dissent. This court has been treated to a lengthy oral argument of facts by plaintiffs, followed by an even more vehement discussion of confusing, conflicting and even opposite facts by defendant. Clearly, the present posture of this case calls for a trial to resolve relevant facts in two crucial areas, once and for all.

First, the majority's decision permits defendant to amend its answer some two years after the original answer was

filed.[1] The amendment allows defendant to plead the defense of estoppel, quasi-estoppel or duty of consistency. The conclusion of the majority is premised upon its opinion that amendment should be granted "in the interests of justice" under Ct. Cl. Rule 39. Normally, I would agree with the court. Leave to amend should be freely granted where one party presents a valid claim or defense and the other party is not prejudiced by the amendment. *Foman* v. *Davis,* 371 U.S. 178, 182 (1962). However, I believe that defendant must be compelled to do justice in order to reap its benefits. In the instant case plaintiffs allege that defendant's conduct has caused them to undertake expensive discovery procedures which could have been avoided had defendant submitted a proper answer. Accordingly, I would, at least, condition defendant's leave to amend on repayment of any additional costs caused by its erroneous course of conduct. A trial to determine such amounts is necessary.

Second, the majority finds plaintiffs bound to use the estate tax values for computation of gain on subsequent stock redemptions under a "duty of consistency." The

---

[1] Even more serious is the majority's dicta to the effect that defendant need not have entered a motion to amend its answer in order to rely on the "duty of consistency" defense. The court bottoms this idea on its notion that the duty is more in the nature of a *legal defense* rather than an *equitable one.* However, the court's characterization ignores the dictates of Ct. Cl. Rule 37 and the philosophy of notice pleading. Rule 37(b) requires that affirmative defenses or matters constituting an avoidance be specifically set forth in the pleadings. The "duty of consistency" is clearly in the nature of an avoidance. As such it must be set forth affirmatively in defendant's answer, or waived under Ct. Cl. Rule 38(h). Otherwise defendant could "trap" unwary plaintiffs by failure to put them on notice that they will have to resist the "duty of continuity" avoidance.

majority distinguishes *Ford* v. *United States*, 149 Ct. Cl. 558, 276 F. 2d 17 (1960), on the basis that the plaintiffs in that case were sufficiently removed from earlier representations as to alleviate any estoppel or duty of consistency. The majority in the present action, *without the benefit of a trial on the operative facts*, finds that the plaintiffs are either identical or so closely related to those who made earlier representations as to be bound by the earlier declarations. The court would apparently give only lip service to the admonition of *Ford* that:

> [A]pplication of the doctrine of estoppel and *related doctrines with an equitable flavor*, * * * be proceeded with cautiously, and with careful regard to the circumstances of the case.

Although the majority states that it has given such careful consideration to the circumstances of this case, the detailed factual disputes which highlighted oral argument have apparently been resolved in favor of the Government. This is especially crucial with regard to the International Trust in which different taxpayers are being held to the "duty or consistency" without key findings as to the closeness of their relationship or without other crucial determinations (important in *Ford*) as to actions taken by the IRS at the time of the estate tax filings. Again, I would remand the case to the trial division for resolution of relevant facts and the applicability of the *Ford* case to the present action.

I, therefore, dissent from the decision of the majority and would remand this entire matter to the trial judge for appropriate action not inconsistent with the above.

ORDER OF THE UNITED STATES
COURT OF APPEALS

DENYING PETITIONERS' MOTION FOR
REHEARING AND SUGGESTION FOR
REHEARING *EN BANC*

ENTERED OCTOBER 1, 1976.

ORDER OF THE UNITED STATES COURT OF APPEALS

DENYING PETITIONERS' MOTION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* ENTERED OCTOBER 1, 1976.

IN THE UNITED STATES COURT OF CLAIMS
* * (Caption—No. 471-73) * *

Before NICHOLS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

ORDER

This case comes before the court on plaintiffs' motion, filed July 26, 1976, for rehearing and suggestion for rehearing *en banc* pursuant to Rules 151(b) and 7(d). Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied*, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiffs' said motion for rehearing, field July 26, 1976, be and the same is denied*.

BY THE COURT
/s/ *Philip Nichols, Jr.*
Philip Nichols, Jr.
Judge, Presiding

October 1, 1976.

---

* Judge Kunzig would allow plaintiffs' suggestion for rehearing *en banc* filed under Rule 7(d) and the motion for rehearing filed under Rule 151(b).

SECTION 1014(a) OF THE INTERNAL
REVENUE CODE, AS AMENDED

INTERNAL REVENUE SERVICE
REVENUE RULING 54-97

RULES 37(b), 38(b) & (h), 39(a) and 101
OF THE UNITED STATES COURT OF CLAIMS

Section 1014(a) of the Internal Revenue Code of 1954, 26 U.S.C. §1014(a), as amended, reads as follows:

> "SECTION 1014. BASIS OF PROPERTY ACQUIRED FROM A DECEDENT.
>
> (a) In General.—Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death, or, in the case of an election under either section 2032 or section 811(j) of the Internal Revenue Code of 1939 where the decedent died after October 21, 1942, its value at the applicable valuation date prescribed by those sections."

Revenue Ruling 54-97, 1954-1 CB 113 reads as follows:

> "For the purpose of determining the basis under section 113(a)(5) of the Internal Revenue Code of property transmitted at death (for determining gain or loss on the sale thereof or the deduction for depreciation), the value of the property as determined for the purpose of the Federal estate tax shall be deemed to be its fair market value at the time of acquisition. Except where the taxpayer is estopped by his previous actions or statements, such value is not conclusive but is a presumptive value which may be rebutted by clear and convincing evidence."

United States Court of Claims Rules 37(b), 38(b) & (h), 39(a) & 101 read as follows:

> "Rule 37. Defenses.
>
> (b) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release,

> res judicata, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court (or the commissioner) may, if justice so requires, treat the pleading as if there had been a proper designation.
>
> "Rule 38. Defenses and objections—When and how presented.
>
> (b) Defenses—How Presented. Every defense in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or a third-party claim, shall be asserted in the responsive pleading thereto if one is required except that the following defenses may, at the option of the pleader, be made by motion: (1) lack of jurisdiction of the subject matter or the person, and (2) failure to state a claim upon which relief can be granted. A motion making either of these defenses shall be filed before pleading further if a further pleading is permitted. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a response pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading and presented to and are not excluded by the court the motion shall be treated as one for summary judgment and shall be disposed of as provided in Rule 101, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 101.
>
> (h) Waiver of defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided for in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim, may also be made by a later pleading, if one is per-

mitted, or by motion for judgment on the pleadings; and (2) that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. (As amended effective Oct. 25, 1974.)

"Rule 39. Amended and supplemental pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before the service on him of a responsive pleading, or of a motion to dismiss or for summary judgment, or if the pleading is one to which no responsive pleading is permitted, he may so amend it at any time within 30 days after it is served. Otherwise, a party may amend his pleading (1) by leave of court (which shall be freely given when justice so requires), or (2) by written consent of the adverse party. In any event, the amendment shall conform to the requirements of paragraph (e) of this rule. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 30 days after service of the amended pleading, whichever period may be the longer, unless the court orders otherwise.

"Rule 101. Summary judgment.

(a) For claimant. Subject to the provisions of paragraph (c) of this rule, a party seeking to recover upon a claim or counterclaim may, at any time after a responsive pleading or a dispositive motion has been filed by the adverse party, move with or without supporting affidavits for summary judgment in his favor upon all or any part thereof.

(b) For defending party. Subject to the provisions of paragraph (c) of this rule, a party against whom a claim or counterclaim is asserted may at any time move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

(c) When leave is required. A motion for summary judgment may not be filed by any party except by leave of court (or the trial judge) (1) after the case has been set for trial, or (2) after the filing of a pretrial memorandum of order in accordance with the Rule 113, or (3) after the filing of his response to a dispositive motion by an adverse party, or (4) after the filing of a stipulation of facts by the parties. (With respect to a stipulation agreed by the parties to contain all the pertinent facts, see Rule 134(b).)

(d) Motion and proceedings thereon. After a motion for summary judgment has been filed, and after the expiration of the time allowed for a response thereto or for a reply to the response, if any (Rule 52(b)), such motion may (subject to the provisions of Rules 54(b), 146(b)(2), and 166(b)) be assigned to the calendar. (See Rule 14(b)(2).) The judgment sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Case not fully adjudicated on motion. If, on motion under this rule, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court may ascertain (if it is practicable to do so upon the basis of examining the pleadings and the evidence before it and interrogating counsel) what material facts exist without substantial controversy and what material facts are in good faith controverted. It shall thereupon make an order specifying the facts that appear to be without substantial controversy (including the extent to which the amount of damages or other relief is not in controversy), and directing such further proceedings in the action as are

just. Upon the trial of the action, the facts so specified shall be deemed to be established, and the trial shall be conducted accordingly.

(f) Form of affidavits—Further testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, will be entered against him.

(g) When affidavits are unavailable. Should it appear from the affidavit of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may deny the motion for summary judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

(h) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the offending party or attorney may be adjudged guilty of contempt. (As amended effective Oct. 1, 1974.)"

No. 76-897

In the Supreme Court of the United States

OCTOBER TERM, 1976

SIDNEY J. HESS, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-897

SIDNEY J. HESS, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the decision of the Court of Claims that their bases for federal income tax purposes in certain shares of stock acquired from two estates were equal to the fair market value of the stock as determined for estate tax purposes.

The pertinent facts are as follows: Petitioners are trustees of testamentary trusts established under the will of Barney Ets Hokin and beneficiaries of a testamentary trust established under the will of Loraine Ets Hokin (Pet. App. A1-A2). The estate of Barney Ets Hokin and the Loraine Ets Hokin trust owned shares in International Nikoh Corporation (Pet. App. A2-A3). These shares had been valued by the decedents' representatives for federal

estate tax purposes at $98 and $200 per share[1] as of the dates of the decedents' respective deaths and the Internal Revenue Service accepted these values (Pet. App. A12). On February 5, 1965, the Nikoh shares were redeemed at a price of $367 per share (Pet. App. A3).

On their 1965 income tax returns, the estate and trust reported a long-term capital gain based on the difference between the $367 per share redemption price and the $98 and $200 per share values used for estate tax purposes (Pet. App. A4). On November 12, 1968, after the statute of limitations for making adjustment to the values of the stock on the estate tax returns had expired, petitioners filed refund claims asserting that their bases in the Nikoh stock were $367 per share and that they had recognized no gain upon the redemption (Pet. App. A5-A6). In this refund suit, the Court of Claims rejected petitioners' claim. It held that petitioners could not take the position that their bases in the stock for income tax purposes exceeded the values accepted for estate tax purposes (Pet. App. A1-A14).

Section 1014(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides that the basis in property acquired from a decedent "shall * * * be the fair market value of the property" at the valuation date for estate tax purposes. Section 2031 of the Code in turn provides that a decedent's gross estate includes the fair market value of all property in which the decedent had an interest. Accordingly, the fair market value determined for estate tax purposes will generally be the basis of the property in the hands of the

[1]The estate of Loraine Ets Hokin originally valued the stock at $128.81 per share. After examination of the return, the Commissioner determined that the correct value was $200 (Pet. App. A2). As the Court of Claims noted (Pet. App. A12), "the estate [sic] representatives acquiesced in [that value] and cannot but have had some input in establishing it, if only by claiming a still lower figure initially."

estate and its successors in interest. Treasury Regulations on Income Tax (1954 Code), Sections 1.1014-1(a), 1.1014-3(a) and (e), and 1.1014-4(a) (26 C.F.R.). Here, however, petitioners seek to disavow the values of the Nikoh stock used for estate tax purposes and claim that the fair market value of the Nikoh stock was significantly higher, so as to increase their bases in the stock and thereby eliminate the gain on the 1965 redemption.

The Court of Claims correctly rejected petitioners' attempt to whipsaw the government. A taxpayer is not "permitted to found any claim upon his own inequity or take advantage of his own wrong" (*Stearns Co.* v. *United States*, 291 U.S. 54, 62). See *Alamo Nat. Bank* v. *Commissioner*, 95 F. 2d 622, 623 (C.A. 5), certiorari denied, 304 U.S. 577; *Beltzer* v. *United States*, 495 F. 2d 211 (C.A. 8); *Building Syndicate Co.* v. *United States*, 292 F. 2d 623 (C.A. 9); *United States* v. *Hardy*, 299 F. 2d 600 (C.A. 4), certiorari denied, 370 U.S. 912. Compare *Stone* v. *White*, 301 U.S. 532.

As the Court of Claims observed (Pet. App. A12), petitioners, either actively or by acquiescence, presented to the Internal Revenue Service their position as to the values of the Nikoh stock at the pertinent dates for estate tax purposes. After the expiration of the statute of limitations on the estate tax liability, petitioners changed their position with respect to their 1965 income tax liability and contended that the original values had been erroneously understated. Under these circumstances, the Court of Claims properly held that petitioners are estopped from using a valuation for income tax purposes greater than the estate tax valuation. See *Beltzer* v. *United States, supra,* and cases cited therein.

Contrary to petitioners' contention (Pet. 12), the Court of Claims did not hold that the estate tax values conclusively established petitioners' bases under Section 1014(a).

The court recognized (Pet. App. A11) that the estate tax valuation is not always determinative of basis and that the facts of each case must be examined in order to determine whether a taxpayer should be barred from raising a particular claim when an inconsistent position has been previously taken. Compare *Ford* v. *United States*, 276 F. 2d 17 (Ct. Cl.), with *Erickson* v. *United States*, 309 F. 2d 760 (Ct. Cl.). Moreover, petitioners err in asserting (Pet. 11-20) that the Service's examination of the estate tax returns lifts the bar of estoppel. See *Beltzer* v. *United States*, 73-2 U.S.T.C., par. 9512, decided June 8, 1973 (D. Neb.), affirmed, 495 F. 2d 211 (C.A. 8). It is sufficient to establish reliance by the Internal Revenue Service by showing that the government did not collect a tax that would have been due had the disputed item been otherwise represented initially. *Bartel* v. *Commissioner*, 54 T.C. 25; *Akron Dry Goods Co.* v. *Commissioner*, 18 T.C. 1143, affirmed, 218 F. 2d 290 (C.A. 6). Compare *Stone* v. *White*, *supra*.

If petitioners at the time of the estate tax audit had made the representations they now advance, a larger estate tax would have been due. Petitioners are therefore estopped from making those claims to reduce their 1965 income tax liability.[2]

---

[2]Petitioners also argue (Pet. 20-23) that the Court of Claims erred in allowing the government to amend its answer in order to raise the defense that the recovery was barred by equitable principles. Rule 39(a) of the Rules of the United States Court of Claims provides that a party may amend pleadings "by leave of court (which shall be freely given when justice so requires)." The decision whether to grant leave to amend the pleadings is within "the discretion of the trial judge." See *Zenith Radio Corp.* v. *Hazeltine Research*, 401 U.S. 321, 330. Here, for the reasons explained in the text, the court acted well within its discretion in permitting the amendment.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.